Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY and
CHARLES G. KINNEY, ESQ., Petitioners

v.

SHELL OIL COMPANY, Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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61 pp

QUESTIONS PRESENTED

The district court denied Respondent's first Rule 56 motion. With no change in circumstances and giving no explanation, the district court later granted a second Rule 56 motion regarding identical claims in the first motion. The district court then granted Rule 11 sanctions after the second Rule 56 motion even though Petitioners had maintained the same position that had persuaded the court on the first motion.

In this action, a commercial fisherman sued to stop Respondent's selenium pollution of his real and personal property because the appropriate agency refused to act. Since Petitioners had sufficient evidentiary support for every essential element for trespass and nuisance to defeat the first Rule 56 motion as required by Celotex Corp. v. Catrett, the questions presented are:

1. Is the imposition of sanctions against the fisherman's attorney under Rule 11 for opposing the second Rule 56 motion, after defeating the first motion with the same claims and facts that had persuaded the district court to deny the first Rule 56 motion, an abuse of discretion, a denial of due process, or constitutionally vague?

2. Whether the denial of nuisance claims violates a commercial fisherman's right to recover both his lost profits and damages to the fish he catches, without having to show any physical or personal injuries under the Robbins Dry Dock rule.

3. Is the denial of a fisherman's trespass and nuisance claims during Respondent's second Rule 56 motion, even though those claims persuaded the district court to deny the first Rule 56 motion, a taking of a seaman's private property without just compensation for use as a public selenium dump?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY and
CHARLES G. KINNEY, ESQ., Petitioners

v.

SHELL OIL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY ("Fisherman") and his attorney CHARLES G. KINNEY, ESQ. (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, and request a waiver of fees under 28 U.S.C. sec. 1916 (1988) since Fisherman is a seaman.

OPINIONS BELOW

The opinion of the court of appeal (App., infra, 1a - 6a) is unreported. The opinions of the district court (App., infra, 9a - 41a), including the first Rule 56 Order (App., infra, 9a - 24a), the second Rule 56 Order (App., infra, 25a - 34a), and the Rule 11 Order (App., infra, 35a - 41a), are unreported.

JURISDICTION

The court of appeals entered its judgment on Dec. 6, 1996 (App., infra, 7a), after denying a petition for rehearing on Nov. 27, 1996 (App., infra, 8a). The jurisdiction of this Court is

invoked under 28 U.S.C. section 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

Fed.R.Civ.P. 11(b) (1992) ("Rule 11") provides, in pertinent part, that an attorney certifies "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the claims, defenses, and other legal contentions therein are warranted by the existing law" and "the allegations and other factual contentions have evidentiary support".

Fed.R.Civ.P. 56(c) (1992) ("Rule 56") provides, in pertinent part, that summary judgment will be granted if "there is no genuine issue as to any material fact".

The Fifth Amendment of the U.S. Constitution provides, in pertinent part, that no person shall be "deprived" of their "property, without due process of law" and that "private property [shall not] be taken for public use, without just compensation".

Section 1 of the Fourteenth Amendment of the U.S. Constitution provides, in pertinent part, that no state shall deprive any person of "property, without due process of law".

Section 19 of Article I of the California Constitution prohibits private property being "taken or damaged for public use" without just compensation.

STATEMENT

Petitioners, a commercial fisherman and his attorney, sued Respondent SHELL OIL COMPANY in October 1993 in the Superior Court of Contra Costa County, California, alleging trespass, nuisance, and other claims for Respondent's toxic selenium which was being discharged in excessive amounts into northern San Francisco Bay, immediately adjacent to Fisherman's harbor berth. Respondent removed the case to US District Court, Northern District of California, based on diversity of citizenship under 28 U.S.C. sec. 1332(a) (1993).

As established by documents submitted in this case,

Respondent was limited by a regulatory agency to discharging only 2.13 pounds of selenium per day into SF Bay waters after December, 1993 (and to 5.8 pounds per day before that). Respondent was discharging 4 times that amount, and was the cause of 73% of the selenium found in this area. Respondent's selenium settled out of the water and onto the land in measurable amounts (trespass). Respondent's selenium was also eaten by clams which were then eaten by commercially-valuable sturgeon fish, contaminating those fish (nuisance).

Those facts were first alleged in the Fisherman's state complaint at paras. 26-29 (nuisance) and 30-34 (trespass); and re-alleged in the Fisherman's first amended state complaint at paras. 26-29 (nuisance) and 30-34 (trespass); and with leave to amend after the first Rule 56 motion, re-alleged in the Fisherman's second amended federal complaint at paras. 22-25 (nuisance) and 26-30 (trespass).

Before filing the original lawsuit, Petitioners had determined that Respondent was violating its National Pollutant Discharge Elimination System ("NPDES") permit issued by the San Francisco Bay Regional Water Quality Control Board ("RWQCB") under authority of the U.S. Environmental Protection Agency ("EPA"), and had been discharging this excess selenium intentionally.

Based on technical reports and maps published by the RWQCB, Petitioners had admissible evidence of selenium being discharged from Respondent's oil refinery that was deposited along with total suspended materials (i.e. TSM) onto the land under the water. Respondent's selenium "soot" was physically invading Fisherman's real property interests by settling onto the land at levels 3,500 times higher than selenium dissolved in the water (i.e. causing a trespass injury).

From those same reports and California Dept. of Fish & Game data, Petitioners also had admissible evidence that Respondent's selenium was contaminating the sturgeon fish at concentrations up to 11 times higher than acceptable norms for edible fish (i.e. causing a nuisance injury). There was no claim regarding any decline in those fish.

In 1994, Respondent brought its first Rule 56 motion.

In opposition, Petitioners submitted 26 exhibits and Fisherman's real property tax bill as supporting facts.

Those facts persuaded the district court to deny this motion as to trespass, nuisance, negligence, and interference with business opportunities. Even though the district court did not discuss all of the genuine issues of material fact, that motion was denied because there was sufficient evidentiary support for each and every essential element of Petitioners' claims for trespass and nuisance (App., infra, 9a - 24a).

Nothing of legal relevance or factual significance happened between the district court's ruling on the first Rule 56 motion and Respondent's filing of the second Rule 56 motion in 1995, eight months later.

In opposition to the second Rule 56 motion, Petitioners requested judicial notice of the same 26 exhibits and the property tax bill, and summarized those facts in 29 separate statements of disputed and undisputed material facts. That material presented the same supporting facts that had persuaded the district court to deny the first Rule 56 motion but, with no warning or indication of a change in thinking, the district court reversed itself and granted the second motion (App., infra, 24a - 34a).

The district court then compounded the problem by granting Rule 11 sanctions as requested by Respondents (App., infra, 35a - 41a). This was done without any explanation by the district court as to how a well-pleaded complaint, adequately supported by factual material as determined by the district court in the first Rule 56 motion, suddenly became a frivolous pleading justifying sanctions.

These Rule 11 sanctions were granted for the trespass and nuisance claims, even though Petitioners had successfully opposed the first Rule 56 motion eight months before by presenting sufficient evidentiary support for each and every essential element for those two claims.

In 1996, the Ninth Circuit affirmed the district court's decisions by side-stepping several important facts. First, the court of appeals ignored Fisherman's maritime rights which allowed him to recover damages without the need to show any

physical or personal injuries (App., infra, 2a - 3a). Next, the court of appeals ignored the contamination of fish by selenium even though Fisherman, as a seaman, has personal property rights to unpolluted fish (App., infra, 3a - 4a). Lastly, the court of appeals ignored how much selenium settled onto the land by only discussing selenium dissolved in the water, which was 3,500 times less concentrated (App., infra, 4a - 5a).

REASONS FOR GRANTING THE PETITION

I. It was reasonable to pursue Fisherman's claims

The "standard of conduct under Rule 11 is one of objective reasonableness". Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 538 (1991).

It was reasonable for Fisherman's attorney to pursue this litigation and oppose the second Rule 56 motion since: (1) there was admissible concrete evidence of trespass and nuisance caused by Respondent's excessive selenium, and (2) Respondent's NPDES permit was never amended to allow the discharge of excessive selenium. California Public Interest Research Group v. Shell Oil Co., 840 F.Supp. 712, 715-719 (N.D.Cal. 1993); Citizens for a Better Environment v. Union Oil Co., 861 F.Supp. 889, 899-903 (N.D.Cal. 1994).

Respondent had been and is still intentionally discharging excess selenium in violation of an effluent limitation in its NPDES permit, which is a felony. People v. Buena Vista Mines, Inc., 48 Cal.App.4th 1030, 1036-1037, 56 Cal.Rptr.2d 21, __ P.2d __ (1996) {willful violation of a specific limit in a NPDES permit is a felony under Cal. Water Code sec. 13387}.

After the defeat of the first Rule 56 motion, it was reasonable to believe that Petitioners had a well-pleaded complaint, adequately supported by factual material.

During the next eight months, nothing changed of legal or factual relevance regarding these claims.

Regardless, without warning just before trial, the district court decided this litigation had suddenly become frivolous justifying Rule 11 sanctions.

A. When Petitioners satisfied the Celotex test in defeating the first Rule 56 motion, they also satisfied the Rule 11 test

When Petitioners defeated Respondents' first Rule 56 motion, that meant each and every essential element of the trespass and nuisance claims had sufficient evidentiary support, even if every essential element was not specifically mentioned in the district court's decision (App., infra, 9a - 24a). Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986).

An abuse of discretion occurs when a lower court bases its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence (with all inferences in Petitioners' favor). Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) {abuse of discretion standard for review; there is an abuse of discretion if an erroneous view of the law or if a clearly erroneous assessment of the evidence}.

Here, abuses of discretion occurred when the court of appeals determined that Petitioners had "entirely failed to produce any evidence" (App. infra, 5a), and when the district court determined Petitioners had "no evidentiary support" (App., infra, 39a), in opposing the second Rule 56 motion, when eight months before, Petitioners had successfully defeated the first Rule 56 motion with the same evidence and the same claims.

It cannot be said that a Rule 11 violation has occurred simply because the evidentiary support for Petitioners' claims was weaker than expected, since: (1) Petitioners' supporting facts for both trespass and nuisance were the same in the oppositions to both of Respondent's Rule 56 motions, (2) the first Rule 56 motion was defeated as to these same two claims, and (3) Petitioners had to make a sufficient showing on each and every essential element of these two claims to successfully oppose any Rule 56 motion regardless of when that motion was brought. Celotex Corp. v. Catrett, 477 U.S. at 322-324; Reich v. ConAgra, Inc., 987 F.2d 1357, 1359-1360 (CA8 1993) {non-movant must make sufficient showing on each and every essential element of its case}; Calif. Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466,

1472 (CA9 1987) (en banc), cert. den. 484 U.S. 1006 (1988) {suit was not so baseless that sanctions ought to be imposed}.

More particularly, the defeat of that first Rule 56 motion meant sufficient evidentiary support existed for the elements of causation and injury regarding both the trespass and nuisance claims (App., infra, 20a - 22a). Those two claims were never modified, and all of the facts supporting those claims were presented at both the first and second Rule 56 motions.

Since it was reasonable to pursue these claims because evidentiary support existed on every element (as determined by the first Rule 56 decision), Rule 11 sanctions should not have been granted.

B. Due process was denied when Rule 11 sanctions were imposed

The very essence of due process is the protection of the individual against arbitrary action. Slochower v. Board of Higher Education, 350 U.S. 551, 559 (1956), reh den. 351 U.S. 944. When a district court goes outside the accepted notions of justice, due process is denied. Leland v. Oregon, 343 U.S. 790, 798-799 (1952).

It is an accepted notion of justice that when the claims present a "genuine issue" of material facts (i.e. the Rule 56 test), those same claims are warranted by the existing law and the same factual contentions have "evidentiary support" (i.e. the Rule 11 test).

Here, Petitioners thought they had passed both the Rule 56 test and Rule 11 test by defeating the first Rule 56 motion, only to have the prior decision reversed without warning and sanctions imposed. This was outside the accepted notions of justice.

C. The application of these Rule 11 sanctions was unconstitutionally vague

It is a common understanding that a Rule 56 motion (which must show genuine issues of material fact) has a higher

standard than for a Rule 11 motion (which must only show some evidentiary support).

If the application of Rule 11 does not convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, it is unconstitutionally vague. Jordan v. De George, 341 U.S. 223, 231-232 (1951), reh den. 341 U.S. 956 {noncriminal statute is unconstitutionally vague under due process clause where its language does not convey sufficiently definite warning as to proscribed conduct when measured by common understanding and practice}.

The attorney had no reason to know that pursuing the same claims during the second Rule 56 motion, with the same facts supporting all essential elements of the same claims from the first motion, might subject him to Rule 11 sanctions.

II. Fisherman is a favorite of admiralty and enjoys a special protected position

A commercial fisherman is a seaman who has special property rights in the fish he tries to catch under either admiralty or state tort law, without having to prove any physical or personal injuries whatsoever.

Here, both the district court and court of appeals abused their discretion when they never considered Fisherman's maritime rights as a seaman. This conflicts with rulings in a majority of the districts.

Furthermore, both lower courts never considered this case to be an exception to the "Robbins Dry Dock Rule" and that, as such, neither physical nor personal injury was required to be shown. Union Oil Company v. Oppen, 501 F.2d 558, 567-570 (CA9 1974) {fishermen can recover lost profits from pollution and is an exception to Robbins Dry Dock rule; fish are a "resource" of the sea used in ordinary course of a commercial fisherman's business}; Robbins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927).

The First, Second, Third, Fifth, Ninth, and Eleventh Circuits have all followed the Union Oil Co. v. Oppen ruling. In

all of those districts, a commercial fisherman like Fisherman is a favorite of admiralty and enjoys a protected position regarding his diminution of profits, injuries to his business caused by pollution, and general damages to the resources of the sea (i.e. to the fish) from pollution. Burgess v. M/V Tamano, 370 F.Supp. 247, 250 (D.Me. 1973) {fishermen have "particular" damage from pollution of waters and marine life}; Matter of the Complaint of Oswego Barge Corp. v. United States, 664 F.2d 327, 334 (CA2 1981) {negligent conduct causing loss to others can constitute a traditional "maritime nuisance tort"}; National Sea Clammers Assoc. v. City of New York, 616 F.2d 1222, 1235-1236 (CA3 1980) {need not elect between admiralty and non-admiralty remedies}; State of LA Ex Rel Guste v. M/V Testbank, 752 F.2d 1019, 1026-1027 (CA5 1985), cert. den. 477 U.S. 903 {fishermen have historically enjoyed a protected position under maritime law}; In re Glacier Bay, 865 F.Supp. 629, 641 (D. Alaska 1991) {fishermen get lost profits regardless of physical damage to person or property} and Slaven v. BP America, Inc., 786 F.Supp. 853, 860-861 (C.D.Cal. 1992) {fishermen can recover under either federal admiralty or California law}; Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813, 819-820 (CA11 1984) {commercial fishermen can recover lost profits}.

Here, the district court acknowledged that Fisherman was a commercial fisherman (App., infra, 10a and 24a). Petitioners had concrete evidence of Fisherman's lost profits from less fishing trips (App., infra, 2a - 3a) and evidence of damages to the resource of the sea because of high selenium contamination in clams and sturgeon fish (App., infra, 4a). Under either maritime or state tort law, this is enough to prove damages to a seaman even without any declarations from his customers.

Assuming for the moment that customers' declarations were necessary -- a typical commercial fisherman could never show damage since he usually never has any "customers" actually on his fishing boat. The fish themselves cannot give any declarations, and the polluter could always argue that the fish were not biting that day. If the district court's decision is

correct, this would mean a typical commercial fisherman could never recover lost profits because he could never produce any such declarations.

Here, it was sufficient to present evidence of the selenium "soot" settling onto the land, the excessive selenium contamination of the sturgeon, and the lack of fishing trips booked by Fisherman to show there had been a compensable injuries under either maritime or state tort law.

III. The denial of trespass and nuisance claims constitutes a taking of private property of a seaman for a public use without just compensation

The district court acknowledged that Fisherman had a real property possessory interest in the land under his harbor berth (App., infra. 11a), and that he was a commercial fisherman or seaman (App., infra. 10a). Furthermore, in order to defeat the first Rule 56 motion, Petitioners had to make a sufficient showing on each and every essential element of their case for which they had the burden of proof. Celotex Corp. v. Catrett, 477 U.S. at 322-324. That had several consequences.

When the district court admitted Fisherman had a real property interest in the land under his harbor berth next to Respondent's oil refinery, and that he could maintain a trespass action (App., infra, 22a), evidence must have been presented for the elements of causation and injury to support that trespass claim. It is of no consequence that every essential element for trespass was not specifically mentioned in the district court's decision (App., infra, 9a - 23a).

When the district court held that Fisherman could maintain a nuisance action (App., infra, 21a), evidence must have been presented for the elements of causation and injury to support that nuisance claim. Even though the district court does not analyze all of the different elements of Fisherman's nuisance claim, he must have had a personal property interest or "particular" interest in the land and/or in the fish he catches as a seaman to persuade the district court that he could maintain a nuisance claim.

Using RWQCB's technical reports, Petitioners presented clear evidence that 73% of the selenium "soot" was from Respondent, and that it was physically invading Fisherman's real property interests by settling onto the land under his harbor berth at concentrations 3,500 times higher than selenium "dissolved" in the water. That caused a trespass.

From those same RWQCB reports and Calif. Dept. of Fish & Game data, Petitioners presented clear evidence that this selenium was contaminating the sturgeon fish stocks at levels up to 11 times higher than the acceptable normal level for edible fish, and that Fisherman commercially fished for this sturgeon. That was an actionable nuisance.

In opposing the Rule 56 motions, it was not necessary for Petitioners to prove in their favor each issue of material fact. All that was required was sufficient evidence supporting a material factual dispute to require resolution by a trier of fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Both the district court and the court of appeals had to accept Petitioners' evidence as true and presume all inferences in Petitioners' favor, which they did not do. Those credibility determinations, weighing of the evidence, and drawing of legitimate inferences from the facts are functions that require a jury to resolve the parties' differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-252.

In reviewing the district court's decisions, the court of appeals abused its discretion when it said Respondent's selenium was "deposited beneath the bay", but was "slight enough that it does not materially increase the ambient levels in the bay" (App., infra, 4a). Thus, the court of appeals (and the district court) weighed the evidence, ignoring RWQCB technical reports and maps with contradictory statements.

The court of appeals also abused its discretion when it stated the "trespass claim ... rests solely on his assertion that selenium dissolved in the water which passes under his berth constitutes a trespass" (App., infra, 4a). The court of appeals (and the district court) failed to accept as true evidence of selenium "soot" that settled onto the land at 3,500 times greater concentration than selenium "dissolved" in the water.

A. Either Fisherman was entitled to damages or his (real and personal) property was inversely condemned.

Fisherman is entitled to either trespass (and nuisance) damages, or is entitled to recover in inverse condemnation when his property rights (real and personal) was taken without just compensation to be used as a public selenium dump.

When Fisherman was denied recovery for damages, the district court and court of appeals acted as a governmental agency, in concert with RWQCB's inaction, to take a seaman's property without just compensation for a public use as a disposal area for excess selenium from several oil refineries. Richards v. Washington Terminal Co., 233 U.S. 546, 554-558 (1914) {a taking occurs even though some activity was authorized by "grants of privilege to corporate bodies"}; First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 313-320 (1987) {temporary takings are actionable; no constitutional violation occurs until just compensation is denied by governmental action}.

The Fifth Amendment prohibits any governmental activity that takes private property for public use without just compensation. Private property can include both real property and personal property (e.g. the resources of the sea), and can even include Fisherman's business goodwill.

The Fourteenth Amendment makes that applicable to the states, and the California Constitution prohibits private property being "taken or damaged" for public use without just compensation. U.S. Const. amend. V and amend. XIV, sec. 1; Cal.Const. art. I, sec. 19; Belair v. Riverside County Flood Control Dist., 47 Cal.3d 550, 558, 253 Cal.Rptr. 693, 764 P.2d 1070 (1988).

As calculated from RWQCB reports, Respondent is discharging 73% of this excess selenium directly adjacent to Fisherman's harbor berth, with the remainder of the excess selenium coming from two other nearby refineries.

Since there is 3,500 times more selenium "soot" on the land compared to selenium dissolved in the water, that's

concrete evidence of a material trespass by physical invasion of Respondent's selenium.

Since a resource of the sea (i.e. the sturgeon fish) is 11 times more contaminated than the acceptable levels for edible fish, that's concrete evidence of a substantial nuisance caused by Respondent's selenium.

As noted above, Fisherman need not have any evidence of physical or personal injuries to maintain these trespass and nuisance claims.

However, by actions of the district court and court of appeals, Fisherman's real and personal property interests have been damaged and taken without just compensation for use as a public selenium dump. Unfortunately, if Fisherman now sues in state court for inverse condemnation to enforce his rights, he may not be considered a "favorite of admiralty" but rather a "vexatious litigant" under Cal. Code of Civil Procedure sec. 391(b); that would violate the intent of the Fifth Amendment.

CONCLUSION

The petition for writ of certiorari should be granted.

Alternatively, in view of the conflict of the decisions below with past decisions of this Court, the Court may wish to consider summary reversal under Sup.Ct.R. 16 (1995) and 28 U.S.C. sec. 2106 (1992).

Respectfully submitted,

Dated: 2-21, 1997

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Counsel for Petitioners
SCHUYLER VAN SCOY and
CHARLES G. KINNEY, ESQ.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

SCHUYLER VAN SCOY and
CHARLES G. KINNEY, ESQ., Petitioners

v.

SHELL OIL COMPANY, Respondent

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY, Plaintiff-Appellant and CHARLES G. KINNEY Appellant v. SHELL OIL COMPANY Defendant-Appellee	)	Nos. 95-16315, 96-15008 D.C. No. CV-93-004383-FMS MEMORANDUM*

Appeal from the
United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted September 17, 1996
San Francisco, California

Before: CHOY, CANBY, and FERNANDEZ, Circuit Judges

Schuyler Van Scoy appeals the district court's grant of summary judgment in favor of Shell Oil Company in Van Scoy's state law tort action alleging that Shell tortiously injured him by dumping excessive amounts of selenium into the San Francisco Bay. Van Scoy's attorney also appeals the district

court's levying of sanctions against him because he pursued Van Scoy's tort claims after it was apparent that there was no injury and no causation. See Fed.R.Civ.P. 11. We affirm.

1. The district court did not err when it concluded that Van Scoy had failed to submit evidence demonstrating that he had suffered any physical injury from Shell's selenium discharge. He claimed that he had eaten tainted fish, but there was no evidence that there was excess selenium in his body, that he had any symptoms of selenium poisoning, or, for that matter, that there had ever been a documented case of poisoning from eating selenium-tainted fish.

Neither did the district court err when it concluded that Van Scoy suffered no cognizable emotional injury. To be cognizable under California law, emotional and mental distress must be objectively "serious" such that "a reasonable person normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case". Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 989 & n.12, 863 P.2d 795, 810-11 & n.12, 25 Cal.Rptr.2d 550, 565-66 & n.12 (1993) (quotation and citations omitted); see also Molien v. Kaiser Found. Hospitals, 27 Cal.3d 916, 928-30, 616 P.2d 813, 819-21, 167 Cal.Rptr. 831, 837-38 (1980). All Van Scoy has shown is that he was "angry and upset" about the selenium discharges. That alone is simply not serious enough under California law. See Twaite v. Allstate Ins. Co., 216 Cal.App.3d 239, 258, 264 Cal.Rptr. 598 (1989).

Van Scoy also failed to submit evidence of any economic injury. He contends that he suffered economic injury due to Shell's selenium discharge when his party boat business declined and failed, and that he consequently had no choice but to make a distress sale of his boat.1 However, Van Scoy's business had been in decline since 1988 when there was an oil spill at Shell. Van Scoy presented no admissible evidence that the selenium discharges were a contributing factor to his business woes. Instead, Van Scoy relied on statements from his own deposition in which he stated that

customers of his had asked about the selenium content of fish, and then had not hired him. The court properly excluded those statements as hearsay. See Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 851 (9th Cir. 1990). Similarly, the testimony of Van Scoy's expert, Meyer, did not support the conclusion that selenium had caused the business to decline. Instead, Meyer merely posited that selenium "may" be a "potential candidate" in the decline of the business.2

2. The district court did not err when it concluded that the lack of injury was fatal to each of Van Scoy's state law causes of action. An element of each of Van Scoy's theories of recovery is that a plaintiff demonstrate that a defendant's behavior actually and proximately caused plaintiff a concrete injury. To be actionable, a negligent act must cause an injury. "It is a fundamental principle 'that a negligent act does not give rise to liability without damage.'" Stevens v. Geduldig, 42 Cal.3d 24, 35, 719 P.2d 101, 1008, 227 Cal.Rptr. 405, 412 (1986) (quoting Witkin, Summary of California Law, Tort, p. 3135 (8th ed. 1974)); see also Newhall Land & Farming Co. v. Superior Court, 19 Cal.App.4th 334, 347, 23 Cal.Rptr.2d 377, 384-85 (1993) (negligence requires violation of duty that proximately causes injury to property). Similarly, injury is required to establish intentional interference with prospective economic advantage. See Morningstar, Inc. v. Superior Court, 23 Cal.App.4th 676, 695-96, 29 Cal.Rptr.2d 547 558 (1994) (tort of intentional interference with prospective economic advantage requires showing of "damages to the plaintiff proximately caused by the acts of the defendant"). Because, as already discussed, Van Scoy failed to establish any injury whatsoever, the district court properly granted summary judgment as to his negligence and interference claims.

To establish a claim for nuisance, one must show "a substantial and unreasonable invasion of one's interest in the free use and enjoyment of one's property." Lussier v. San Lorenzo Valley Water Dist., 206 Cal.App.3d 92, 100, 253 Cal.Rptr. 470, 473 (1988); see also San Diego Gas & Elec. Co.

v. Superior Court, __ Cal.4th __, __, 920 P.2d 669, __, 55 Cal.Rptr.2d 724, 751-52 (1996) (electromagnetic emissions constitute nuisance only if they substantially interfere with the use and enjoyment of land). Van Scoy failed to submit evidence that Shell's discharge of selenium has limited his usage of his land in any way whatsoever. He has not shown that the selenium can be perceived. Consequently, summary judgment was appropriate on the nuisance claims.

To establish a trespass, a plaintiff does not generally need to establish damage to the property. See Staples v. Hoefke, 189 Cal.App.3d 1397, 1406, 235 Cal.Rptr. 165, 171 (1987). Instead, a trespass occurs when a defendant's intentional, reckless, negligent or ultrahazardous activity causes the physical invasion of a person's possessory interest in land. See Wilson v. Interlake Steel Co., 32 Cal.3d 229, 233, 649 P.2d 922, 924, 185 Cal.Rptr. 280, 282 (1982 ("liability for trespass will not be imposed unless the trespass was intentional, the result of recklessness, negligence, or the result of an extra-hazardous activity."); Girard v. Ball, 125 Cal.App.3d 772, 788, 178 Cal.Rptr. 406, 414 (1981). Van Scoy has entirely failed to submit evidence that there has been any trespass whatsoever. Van Scoy has submitted no evidence that there has been any excess selenium deposited on the land beneath the water under his leased berth. He has submitted evidence that Shell and others have released selenium which entered the bay, and that selenium has bioaccumulated in some aquatic life and deposited beneath the bay. However, Shell's release is slight enough that it does not materially increase the ambient levels in the bay. Even assuming that Van Scoy has a possessory interest in the land beneath the water under his berth, Van Scoy's lack of evidence of any excess accumulation on that land related to Shell's release of selenium is fatal to his trespass claim. Van Scoy's trespass claim, therefore, rest solely on his assertion that selenium dissolved in the water which passes under his berth constitutes a trespass. The California Supreme Court has said that "actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion." Wilson, 32 Cal.3d at 233, 649 P.2d at 924, 185

Cal.Rptr. at 282; see also San Diego Gas & Elec., __Cal.4th at __, 920 P.2d at __, 55 Cal.Rptr.2d at 750 (electromagnetic emissions are intangible phenomena which constitute trespass only if they cause damage). The dissolved selenium in the water is analogous to tiny particles in air that cause an odor. Therefore, the dissolved selenium in the water does not trespass on Van Scoy's land even if some of it is emitted from Shell's pipe.

3. The district court did not abuse its discretion when it awarded sanctions under Federal Rule of Civil Procedure 11 for Van Scoy's trespass and nuisance claims. Sanctions are warranted under Rule 11 if the allegations and other factual contentions are entirely lacking in evidentiary support. Fed.R.Civ.P. 11(b-c); In Re Keegan Management Co., Securities Litigation, 78 F.3d 431, 434 (9th Cir. 1996). Sanctions are appropriate for "insisting upon a position after it is no longer tenable ...." Fed.R.Civ.P. 11 advisory committee's note.

As discussed above, Van Scoy entirely failed to produce any evidence in support of his claims of harm. The district court quite properly sanctioned his attorney for pursuing those claims after the absence of evidence became apparent.

4. Finally, the district court did not err when it awarded copying costs to Shell. Other that a small portion, which the district court disallowed, Shell carried its burden of presenting its cost bill to the district court, and Van Scoy did not come forward with anything to indicate that the costs were improper.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1. Van Scoy also contends that the decline in fish population harmed him as a fisherman with a property interest in the fish. However, Van Scoy did not raise this assertion in the district

court, and therefore has waived it. See Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1438 (9th Cir. 1993) ("because Hughes raises this argument for the first time on appeal, Hughes has waived it"); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1264 (9th Cir. 1990).

2. Moreover, the district court properly denied Van Scoy's motion for reconsideration. Under Fed.R.Civ.P. 59(e), reconsideration is proper if the court is presented with newly discovered evidence. Van Scoy's motion was based on two declarations which were submitted for the first time on his motion for reconsideration. For Van Scoy to submit new evidence under Fed.R.Civ.P. 59, he must demonstrate that the new evidence was newly discovered and that he could not have discovered the evidence with reasonable diligence. See School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994); Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th Cir. 1992); Englehard Indus., Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963), cert. denied, 377 U.S. 923, 84 S.Ct. 1220, 12 L.Ed.2d 215 (1964). Van Scoy's two declarations were from customers who had been listed in Van Scoy's May 31, 1995 Supplement to Answers to Interrogatories. Moreover, one of the declarants was Van Scoy's mother. The district court did not abuse its discretion.

Endorsed file-stamped on Oct. 2, 1996

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY,	Nos. 95-16315, 96-15008
Plaintiff-Appellant	
	CT/AG#:
and	CV-93-04383-FMS
CHARLES G. KINNEY	
Appellant	
v.	
SHELL OIL COMPANY	
Defendant-Appellee	

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this be, and hereby is AFFIRMED. Costs taxed.

Filed and entered October 2, 1996.

Endorsed file-stamped on Dec. 6, 1996.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SCHUYLER VAN SCOY, Plaintiff-Appellant v. SHELL OIL COMPANY Defendant-Appellee	)	No. 95-16315 D.C. No. CV-93-04383-FMS ORDER DENYING PETITION FOR REHEARING
SCHUYLER VAN SCOY, Plaintiff-Appellant v. SHELL OIL COMPANY Defendant-Appellee and CHARLES G. KINNEY Appellant	)	No. 96-15008 D.C. No. CV-93-04383-FMS

Before: CHOY, CANBY, and FERNANDEZ, Circuit Judges

Appellants' petition for rehearing is DENIED.

Endorsed file-stamped on Nov. 27, 1996.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCHUYLER VAN SCOY, Plaintiff (s), vs. SHELL OIL COMPANY, Defendant (s).	) No. C 93-4383-FMS)) ORDER GRANTING) DEFENDANT'S) MOTION FOR) JUDGMENT ON THE) PLEADINGS WITH) LEAVE TO AMEND) WITHIN 20 DAYS OF) THIS ORDER; GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART; DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART

ISSUES

This motion requires the Court to decide: 1) whether California recognizes an "intentional tort"; 2) whether Defendant Shell Oil Company's ("Shell") operation of an oil refinery and discharge of selenium-containing wastewater is an "ultrahazardous activity" under California law; 3) whether Plaintiff Schuyler Van Scoy ("Van Scoy") may bring an action for nuisance/ encroachment and/or trespass where Van Scoy has no ownership interest in the allegedly harmed real property; and 4) whether Van Scoy's actions for negligence and intentional interference with business opportunities are barred by the applicable statutes of limitations and/or the doctrine of res judicata.

For the reasons stated below, the Court holds that an "intentional tort" is not an independent cognizable tort under California law; that Shell's operation of an oil refinery and discharge of selenium-containing wastewater is not an "ultrahazardous activity" under California law; that Van Scoy has a possessory interest in real property harmed by Shell sufficient to support claims of nuisance/encroachment and trespass; and that Van Scoy's negligence and intentional interference with business opportunities causes of action are not barred by the applicable statutes of limitation nor the doctrine of res judicata. Accordingly, Shell's motion for judgment on the pleadings with respect to Van Scoy's claim of "intentional tort" is GRANTED with leave to amend; and Shell's motion for summary judgment is GRANTED in part, and DENIED in part.

INTRODUCTION

Van Scoy alleges physical, emotional, and economic injuries resulting from defendant Shell's operation of an oil refinery adjacent to the Martinez harbor. Van Scoy seeks injunctive relief and monetary damages for such injuries. Shell has filed this motion for judgment on the pleadings and for summary judgment pursuant to Federal Rules of Civil Procedure 12(c) and 56(c), respectively.

BACKGROUND

Van Scoy is a commercial fisherman who rents a harbor berth in Martinez, California. Van Scoy also operated a party-boat fishing business out of the Martinez harbor until the sale of his boat in May 1994. On October 7, 1993, Van Scoy filed suit against Shell in California state court alleging that Shell discharged treated wastewater from its Martinez oil refinery containing impermissible levels of selenium, and that such discharges have caused his injuries. Shell removed the action to federal court on diversity grounds.

Shell collects, stores, and refines crude oil and petroleum products at its Martinez refinery. In the normal course of its operations, Shell discharges treated wastewater containing selenium and selenium deposits into the Martinez harbor. The selenium discharges are regulated by the

Regional Water Quality Control Board ("RWQCB") which issues a permit under the National Pollutant and Discharge Elimination System ("NPDES"). The NPDES permit allows Shell to dump certain levels of selenium into the bay.

Van Scoy asserts that he has suffered physical and emotional injuries as a result of ingesting fish that contained selenium. Van Scoy alleges additional emotional injuries consisting of anger at Shell for dumping toxins into the Bay. Finally, Van Scoy claims economic and non-economic (i.e. inconvenience) injuries to his party-boat fishing business, his ability to sell the boat, and his ability to use and enjoy the areas affected by Shell's discharge of selenium into the harbor.

Van Scoy owns no real property that has been harmed by Shell. Van Scoy does, however, have a possessory interest in the real property underlying the harbor berth that he rents in the Martinez harbor.

Van Scoy filed a separate lawsuit against Shell in April 1989 alleging injuries, including business losses, stemming from an accidental oil spill. A jury awarded Van Scoy $115,000 in economic compensation for his business losses.

DISCUSSION

I. Judgment on the Pleadings Standard

In a Rule 12(c) motion for judgment on the pleadings, the moving party must show that there are no material issues of fact to be resolved and that it is entitled to judgment as a matter of law. General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989), cert. denied, 493 U.S. 1079 (1990) (citing 5 C. Wright & Miller, Federal Practice and Procedure: Civil sec. 1368 (1969(). The facts alleged in the complaint must be taken as true, all reasonable inferences must be made, and all doubts resolved in favor of the non-moving party. Id. Courts are typically reluctant to grant judgment on the pleadings where unsettled questions of law are involved. Electrical Constr. & Maintenance Co. v. Maeda Pac. Corp., 764 F.2d 619 (9th Cir. 1985) (quoting from 5 C.Wright & A. Miller, Federal Practice and Procedure: Civil sec. 1357 (1969)).

II. Second Cause of Action -- "Intentional Tort"

Shell asserts that Van Scoy has failed to set forth facts that entitle Van Scoy to relief under an intentional tort cause of action, and alternatively that no general "intentional tort" cause of action exists under California law. In opposition, Van Scoy asserts that a general "intentional tort" cause of action does exist in California and that Shell is liable under such a claim because it intended harm to Van Scoy when it discharged selenium into the bay in excess of Shell's NPDES permit. Van Scoy is unable to cite any California case which relied upon a general "intentional tort" in finding liability; Van Scoy relies, instead, upon section 870 of the Restatement which provides for a general intentional tort cause of action.

While California courts have previously relied upon the restatement for guidance in interpreting California law, courts have not relied upon the Restatement in establishing a new cause of action absent a strong showing by the parties indicating that a new cause of action is necessary. Finding no such necessity, the Court now turns to a recent case with facts similar to the present one.

In Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965 (1993), the California Supreme Court reviewed numerous damage claims resulting from Firestone's dumping of toxic substances in a landfill site that prohibited such substances. The plaintiffs in Potter alleged intentional infliction of emotional distress and negligent infliction of emotional distress claiming that their fear of cancer increased as a result of Firestone's illegal dumping. In finding Firestone's conduct with the "oppression, fraud or malice" exception of California Civil Code section 3294, thereby allowing the plaintiffs punitive damage recovery, the majority purposefully classified Firestone's actions as an exception to a negligent tort rather than as an intentional tort.1 Id. at 998. this exception states that when one acts with a conscious disregard for the rights or safety of other, is aware of the probable dangerous consequences of his conduct, and willfully and deliberately fails to avoid those consequences, a plaintiff is entitled to recover punitive damages proportionate to the actor's culpability. Id. at 998-99.

In determining whether a plaintiff could recover damages for emotional distress, the Potter court expanded the scope of negligent torts to include the dumping of toxins with conscious disregard for the rights and safety of others. Id. at 997-1000. At the same time, the Court narrowed the scope of the intentional infliction of emotional distress cause of action by requiring the defendant's conduct to be directed toward the particular plaintiff. Id. at 1001. Most importantly, the Potter court implicitly rejected the establishment of an intentional tort for dumping toxins with conscious disregard for the rights and safety of others.2

Applying Potter to Van Scoy's claims, the Court declines to create a new cause of action for Van Scoy's emotional distress injuries, believing that the Potter court would have done so if appropriate. At the same time, the Court need not decide whether the classification of Firestone's actions in Potter extends to all types of injuries (e.g. economic losses and physical injuries) because the court's classification assumed the absence of a physical injury or illness, and much of the court's reasoning behind the classification was influenced by the type of injury (i.e. emotional distress) involved.

Accordingly, Shell's motion for judgment on the pleadings on Van Scoy's "intentional tort" cause of action is GRANTED without prejudice. Van Scoy is, however, given leave to amend his complaint within 20 days of this Order.

III. Summary Judgment Standard

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e) (West 1994). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, plaintiff is not entitled to rely on the allegations of his complaint. See Fed.R.Civ.P. 56(e) (west 1994). Furthermore, "a party cannot manufacture

a genuine issue of material fact merely by making assertions in its legal memoranda." S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982). Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule [that would be admissible as evidence] showing that there is a genuine issue for trial...." Fed.R.Civ.P. 56(e) (West 1994).

The court does not make credibility determinations with respect to evidence offered and is required to draw all inferences in a light most favorable to the non-moving party. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts ...." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324 (9th Cir. 1980).

IV. Third Cause of Action -- "Ultrahazardous Activity"

Shell argues that operating an oil refinery is not an "ultrahazardous activity" subject to strict liability. In opposition, Van Scoy asserts that the ultrahazardous activity is the dumping of selenium into the bay, not the operation of an oil refinery. The Court need not settle this dispute because neither activity is "ultrahazardous" under the test established by California courts.

Whether or not an activity is ultrahazardous is a question of law appropriately decided on summary judgment. Edwards v. Post Transportation Co., 228 Cal.App.3d 980, 983 (1991). California courts have defined an ultrahazardous activity as one which (a) necessarily involves a risk of serious harm to person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage. Id. at 983. No California court has previously considered whether the operation of an oil refinery

or dumping of selenium is ultrahazardous; the Court, therefore, resorts to guidelines established in the Restatement. Using the term "abnormally dangerous" in place of "ultrahazardous," section 520 of the Restatement provides that a court should consider the following six factors when determining whether an activity is ultrahazardous or not:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (second) of Torts sec. 520 (1985). Comment (f) to section 520 states that the factors are to be considered together and that establishment of one factor alone is usually not sufficient to categorize an activity as abnormally dangerous; several factors will typically be required. Id. cmt. f.

Applying the above factors to the discharge of selenium into a waterway, the Court is ultimately swayed by factor (c). The court finds precedent for relying almost exclusively upon this factor in rejecting an ultrahazardous activity claim in Edwards, 228 Cal.App.3d at 986 (holding that the handling an delivery of sulfuric acid was not an ultrahazardous activity because the actual risk of harm could be eliminated through proper handling, despite finding four factors in plaintiff's favor). Accordingly, the Court finds that Shell's activities are not ultrahazardous because Shell has the ability to eliminate the risks of selenium dumping through the exercise of reasonable care. The fact that the RWQCB has set certain limits indicates that it believes a certain amount of selenium discharge is safe. Consequently, Shell could seemingly act within those limits by using reasonable care. Based on the above, the Court

declines to address the remaining factors individually; suffice it to say that the Court finds Van Scoy's position weaker than the plaintiff in Edwards with regard to those factors.

The Court also declines to analyze whether operating an oil refinery is ultrahazardous. The discharge of selenium into the bay is arguably more dangerous than operating an oil refinery and Van Scoy all but concedes in his opposition that operating an oil refinery or handling oil with selenium is not subject to strict liability.

In sum, Shell's motion for summary judgment on Van Scoy's ultrahazardous activity cause of action is GRANTED because Shell could eliminate the risks associated with its activities through the exercise of reasonable care. In making its decision, the Court is also swayed heavily by the fact that an independent body regulates Shell's activities.

V. First and Sixth Causes of Action -- "Negligence" and "Intentional Interference with Business Opportunities"

A. Statute of Limitations

Shell argues that the statutes of limitation have run on Van Scoy's allegations of negligence and intentional interference with business opportunities. Under California civil Procedure Code sec. 340(3), negligence causes of action have a one year statute of limitation; under sec. 339(1), a cause of action for intentional interference with business opportunities has a two year statute of limitation. Shell asserts that Van Scoy was aware of the dangers of selenium deposits in the Martinez harbor as early as 1988, and that Van Scoy is therefore precluded from bringing these causes of action because the statutes of limitation have run.

Van Scoy responds by asserting that Shell has cited the wrong statutes of limitation and that a new statute of limitations begins with each selenium discharge in excess of Shell's permit. Consequently, Van Scoy argues that even if the above California statutes apply, he can still claim injuries for excessive discharges with the allowable limitations period.

Relying on 28 U.S.C. sec. 2462, Van Scoy argues that the applicable statute of limitation for both actions is five years.

This code section, however, applies only to federal claims for penalties, fines and forfeitures, not claims arising under California law. It is well settled that in diversity cases, federal courts follow state law when computing statutes of limitation. See, e.g., Walker v. Armco Steel Corporation, 446 U.S. 740 (1980). Accordingly, the California statutes of limitation apply.

Under California law, the ultimate question concerning the timeliness of Van Scoy's suit depends on when Van Scoy's cause of action accrued. Cal.Civ.Pro. Code sec. 312 (West 1994). In determining when the statute of limitations commences, California courts have applied the "discovery rule." See generally, California Sansome Co. v. U.S. Gypsum Co., 819 F.Supp. 878 (N.D.Cal. 1993). The "discovery rule" protects plaintiffs who are unaware of their injuries through no fault of their own by providing a category of exceptions in cases where a statutory time bar might otherwise apply. Id. at 880. Under this rule, the limitations period begins to run at the point of "suspicion," or when plaintiffs are first put "on inquiry." Id. at 881. This standard applies despite the fact that additional time may reasonably have been necessary to actually conduct the inquiry and confirm the suspicions. Id. In the past, courts have deemed a plaintiff to be "on inquiry" when a plaintiff's reasonably founded suspicions have been aroused, and the plaintiff has actually become alerted to the necessity for investigation and pursuit of the plaintiff's remedies. Id. (citations omitted). The limitations period begins when a plaintiff becomes "alerted to the necessity for investigation," and not when the plaintiff's investigation actually confirms the injury. Id. at 882 (footnote omitted). In order for the statute of limitations to run on Van Scoy, he would have had to be "on inquiry" before October 1992 for the negligence claim and before October 1991 for the intentional interference claim.

Shell asserts that Van Scoy was "on inquiry" as early as the late 1980's because prior to and during 1988, Van Scoy served on the Striped Bass Stamp Advisory Committee. Shell also asserts that Van Scoy had read material about pollutants in the Bay and Delta waters during the late 1980's and had hired an expert in his 1989 suit against Shell, who testified that

Shell was one of six refineries that directly discharged selenium into the bay and that selenium was a harmful substance.

Van Scoy admits that he knew of selenium in the late 1980's, but argues that he was not "on inquiry" until he became aware of Shell's excessive discharges. Prior to that time, Shell had claimed that its discharges were within permitted levels. Van Scoy asserts that he was first put "on inquiry" in December, 1993, when a ruling by a Northern District of California Court exposed Shell's discharges in excess of its NPDES permit.

The Court finds that a distinction must be drawn between Shell's selenium discharges made generally (i.e. within its permitted levels) and those made in excess of Shell's permit. Regarding discharges made within Shell's permit levels, the Court finds that Van Scoy was alerted to the necessity for investigation into the adverse effects of selenium as early as the late 1980's. Accordingly, any damages sought in relation to permitted discharges is barred by the appropriate statutes of limitation. Regarding the excessive selenium discharges, however, Van Scoy is not completely barred from bringing the above claims because at least a portion of the excessive discharges occurred during the allowable limitations period. The Court thus finds that the issue is one of damages apportionment, requiring the presentation of additional facts.3 Shell's summary judgment motion is therefore DENIED.

B. Claim Preclusion

Shell argues that business damage losses for Van Scoy's negligence and intentional interference causes of action are barred by claim preclusion. In 1989, Van Scoy sued Shell for damages stemming from an accidental oil spill in 1988 (Van Scoy I). A jury found for Van Scoy in 1992, awarding Van Scoy $115,000 for business losses. Shell now claims that any business losses Van Scoy has suffered as a result of Shell's selenium discharges are barred because the claims should have been raised in Van Scoy I. Van Scoy responds by asserting that the facts about selenium and the law regarding intentional dumping were not litigated in the first suit, and that there were no grounds for bringing suit due to excessive

selenium discharges in 1988 because Van Scoy did not know of such discharges until after the jury verdict in Van Scoy I.

Claim preclusion prohibits further litigation on the same cause of actio as to matters which were or should have been litigated between parties, regardless of whether they were asserted or determined in the prior proceeding. Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988) (citations omitted). California courts deciding the appropriateness of a claim preclusion defense focus on three questions: (1) was the previous adjudication on the merits, (2) was it final, and (3) does the current dispute involve the same "claim" or "cause of action"? Id. at 324. Because Van Scoy I resulted in a jury verdict, it was a final adjudication on the merits. The ultimate question therefore concerns whether Van Scoy's current claim for business losses is the same claim for which he recovered in Van Scoy I.

To determine whether two claims are the same cause of action or not, California courts apply the "primary rights" test. Slater v. Blackwood, 15 Cal.3d 791, 795 (1975). This test states that a cause of action is defined by the harm suffered, rather than the particular theory asserted by the plaintiff. Id. "[T]here is but one cause of action for one personal injury [which is incurred] by reason of one wrongful act." Id. If the second suit, however, pertains to a separate and distinct injury, claim preclusion does not bar Van Scoy's second cause of action. 7 Witkin, Cal. Procedure, Judgment sec. 246 (3d ed. 1985).

While it is true that Van Scoy is claiming the same type of injury in the present claim as he did in Van Scoy I, (i.e. "business losses") Van Scoy is not claiming the same injury because the present cause of action results from a different act by the Shell. In Van Scoy I, Van Scoy claimed business losses resulting from an accidental oil spill. Here, however, Van Scoy alleges business losses resulting from Shell's discharge of impermissible levels of selenium. The oil spill occurred in 1988 and was a one-time occurrence. By contrast, Shell's discharge of selenium is continuous and Van Scoy is specifically claiming damages resulting from impermissible discharges from about

February 1, 1992 to the present. Shell admits in its motion for summary judgment that its exceeded its permit limits for selenium discharges during the weeks of September 2, 1991 through the week of October 7, 1991, and during the week of February 10, 1992 through the week of November 8, 1993. Consequently, if Shell had presented facts which proved that Van Scoy reasonably knew or should have known about the excessive selenium discharges before the jury verdict, Shell might have prevailed on its motion. Shell has failed, however, to present such facts.

Shell's assertion that Van Scoy had an opportunity to litigate the selenium discharge issue in Van Scoy I is also unavailing because Shell is asserting issue preclusion, not claim preclusion. "'[I]ssue preclusion prevents relitigation of all issues of fact or law that were actually litigated and necessarily decided' in a prior proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). "The issue must have been 'actually decided' after a 'full and fair opportunity' for litigation." Id. (citations omitted). Unlike claim preclusion, issue preclusion does not bar claims that should have been litigated. Consequently, issue preclusion does not bar this action because the ultimate fact issue, Van Scoy's injuries due to impermissible selenium discharges, was not actually and necessarily litigated in Van Scoy I.

In sum, Shell's motion for summary judgment on Van Scoy's negligence and intentional interference with business opportunities causes of action is DENIED because neither cause of action is barred by the applicable statute of limitation or claim preclusion.

IV. Fourth and Fifth Causes of Action -- "Nuisance/Encroachment" and "Trespass"

Shell argues that Van Scoy does not have standing to bring a nuisance/ encroachment or trespass claim because Van Scoy does not own any real property that Shell has allegedly harmed. Shell asserts that a harbor berth is not "real property" sufficient to support a nuisance and/or trespass claim. In opposition, Van Scoy contends that he has a possessory interest in real property as a lessee of a harbor

berth in the Martinez harbor, and that the land underneath the harbor berth is real property protected by the nuisance and trespass statutes.

As a lessee, Van Scoy has a sufficient possessory interest to support both nuisance and trespass causes of action. In Stoiber v. Honeychuck, 101 Cal.App.3d 903 (1980), the court held that "[a]ppellant's tenancy is a sufficient property interest to give her standing to bring an action based on nuisance." Id. at 920 (citations omitted). Similarly, Capogeannis v. Superior Court, 12 Cal.App.4th 675 (1993), held that "California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory - not necessarily ownership -- interest in land from unlawful interference.'" Id. at 674 (citations omitted) (emphasis added). Van Scoy is not required to own real property in order to have a possessory interest sufficient to support both nuisance and trespass causes of action.

California statutes have suggested that certain bodies of water are protected under a nuisance claim. California Civil Procedure Code section 731 provides in pertinent part that:

> [a]n action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code....

Cal. Civ. Pro. Code sec. 731 (West 1994). California Civil Code sec. 3479 defines a "nuisance" as:

> [a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage of use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, ...

Cal. Civ. Code sec. 3479 (West 1994). California lawmakers thus contemplated nuisance actions for interference with the free use and enjoyment of certain bodies of water, including bays. Consequently, Van Scoy's enjoyment and use of his leased harbor berth is protected under California nuisance

statutes.

Trespass is the "unlawful interference with possession of property." Mangini v. Aerojet-General Corp., 230 Cal.App.3d 1125 (1991). Nuisance and trespass differ in that "the mere intentional entry on land may violate the right of exclusive possession and create a right of action for trespass, while conduct or activity cannot amount to a nuisance unless it substantially interferes with the use and enjoyment of land." 11 Witkin, Summary of California Law, Equity, sec. 126 (9th ed. 1988). Thus, although cases have blurred the distinction between nuisance and trespass with regard to remedies, trespass and nuisance are distinguished by the nature of the invasion. Id.; see also, Wilson v. Interlake Steel Co., 32 Cal.3d 229, 234 (1982).

The Court knows of no case and neither Shell nor Van Scoy has cited any case or statute which has applied California trespass doctrine to bodies of water. In Drennen v. County of Ventura, 38 Cal.App.3d 84 (1974), however, the court relied upon section 159 of the Restatement in finding that flight by aircraft in the airspace above the land of another is a trespass if entry into the immediate reaches of the airspace next to the land is involved and the entry interferes substantially with the actual use and enjoyment of the land. Id. at 909-10; see also Restatement (Second) of Torts sec. 159 (1985) (discussing trespasses upon, beneath, and above the surface of the earth). Comment b. provides that water is protected from trespass and comment d. provides that trespass may be committed upon the vertical surface of one's premises, indicating that the land beneath Van Scoy's harbor berth is protected. Accordingly, Van Scoy has a possessory interest in his rented harbor berth and the land beneath the berth sufficient to support a trespass cause of action.

In sum, Shell's motion for summary judgment on Van Scoy's nuisance/encroachment and trespass causes of action is DENIED because Van Scoy has a sufficient possessory interest in real property to support both claims.

CONCLUSION

For the reasons stated above, defendant's motion for

judgment on the pleadings with respect to plaintiff's second cause of action for "intentional tort" is hereby GRANTED with leave to amend within 20 days of the Order; defendant's motion for summary judgment is GRANTED in part; DENIED in part. A status conference is set for December 2, 1994, at 8:30 am.

SO ORDERED.

DATED: October 12, 1994

Signed FERN M. SMITH, United States District Judge

1. The Court felt that while a defendant may be aware that its conduct is wrong and potentially dangerous, it may not have the knowledge of a particular statute or regulation proscribing it. Potter, 6 Cal.4th at 998. The Court also believed that there might be times where a defendant does not specifically intend to violate the law, yet the defendant proceeds to act egregiously in conscious disregard of others. Id.

2. As illustrated by Justice Kennard's dissent, the Potter court was aware of its ability to establish such a cause of action. Potter, 6 Cal.4th at 1018 (Kennard, J., concurring and dissenting) (stating that recognition of a new tort for Firestone's action would be consistent with section 870 of the Restatement).

3. For example, two facts that may have an effect on the apportionment of damages are the amount of excessive discharges made by Shell within the allowable limitations period and the impact that Shell's selenium discharges have had on the Martinez harbor.

Endorsed file-stamped on Oct. 17, 1994.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCHUYLER VAN SCOY,	) No. C 93-4383-FMS
	)
Plaintiff (s),	) ORDER GRANTING
	) DEFENDANT'S
vs.	) MOTION FOR
	) SUMMARY JUDGMENT
SHELL OIL COMPANY,	)
	)
Defendant (s).	)
	)

ISSUES

Defendant's motion for summary judgment requires the Court to determine whether there is a genuine issue of material fact concerning plaintiff's allegations of negligence, nuisance/encroachment, trespass, and intentional interference with business opportunities. The Court holds that plaintiff has failed to demonstrate the existence of a disputed fact concerning any of his causes of action. Defendant's motion for summary judgment is therefore granted in its entirety.1

Introduction

Plaintiff commenced this action in October 1993, alleging physical, emotional, and economic injuries resulting from defendant's operation of an oil refinery adjacent to the Martinez harbor. Plaintiff seeks injunctive relief and monetary damages for his alleged injuries. In September 1994, defendant moved for judgment on the pleadings and for summary judgment, pursuant to Fed.R.Civ.P. 12(c) and 56. After the Court ruled on defendant's motion, plaintiff filed a second amended complaint. Defendant now moves for summary judgment pursuant to Fed.R.Civ.P. 56.

Background

Plaintiff is a commercial fisherman who rents a harbor

berth in Martinez, California. Until he sold his boat in May 1994, plaintiff also operated a party-boat fishing business out of the Martinez harbor.

Defendant collects, stores, and refines crude oil and petroleum products at its Martinez refinery. In the normal course of its operations, defendant discharges treated wastewater containing selenium and selenium deposits into the Martinez harbor. The selenium discharges are regulated by the Regional Water Quality Control Board, which issues a permit under the National Pollutant and Discharge Elimination System ("NPDES"). The NPDES permit allows defendant to dump certain levels of selenium into the bay.

Plaintiff asserts that he has suffered physical and emotional injuries as a result of ingesting fish that contained selenium. In addition, plaintiff claims economic injuries to his party-boat fishing business stemming from defendant's discharge of selenium into the harbor.

Plaintiff filed a separate lawsuit against defendant in April 1989 alleging injuries, including business losses, stemming from an accidental oil spill in 1988. A jury awarded plaintiff $115,000 in economic compensation for his business losses.

Discussion

I. The Summary Judgment Standard

To withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In opposing summary judgment, plaintiff is not entitled to rely on the allegations of his complaint. See Fed.R.Civ.P. 56(e). Furthermore, "a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." S.A. Empresa de Viacao Aerea Rio Grandense

(Varig Airlines) v. Walter Kidde & Co., 690 F.2d 1235, 1238 (9th Cir. 1982). Rule 56 provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts [that would be admissible as evidence] showing that there is a genuine issue for trial ...." Fed.R.Civ.P. 56(e).

The Court does not make credibility determinations with respect to the evidence offered and is required to draw all inferences in a light most favorable to the non-moving party. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Summary judgment is not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts...." Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

II. Analysis

A. Plaintiff Presents No Competent Evidence of Injury

1. Physical Injury

Plaintiff claims that he has been physically injured by eating sturgeon contaminated with selenium from defendant's refinery wastewater. Plaintiff and his medical expert candidly admit, however, that plaintiff has no symptoms of selenium poisoning. Plaintiff's deposition testimony produced the following exchange:

> Q: Assuming that everything you've said is true, that selenium is a toxic, it's been dumped [in]to the Bay, that it exceeds water quality permits, it is toxic in fish, that you have eaten fish with enough selenium that public health has to be notified, what is the basis for your claim that you have been physically harmed by the ingestion of fish containing selenium?
>
> ....
>
> A: That the accumulation in my body because of

these fish that I eat has an effect on me.

Q: And what is that effect?

A: I don't know.

Q: Have you discussed your ingestion of selenium containing fish with any medical practitioner?

A: No.

Q: Has any medical practitioner ever told you that you have a health problem that could be related to selenium in that medical practitioner's opinion?

A: Just let me qualify, in other words, when I go in for a physical has somebody said you have something there that looks like it's selenium related? Is that what --

Q: Yes.

A: No.

Q: Has any medical practitioner told you that you have physical symptoms of poisoning?

A: No.

Q: In your own words, how would you describe your current health? Physical health?

A: Good.

Deposition of Schuyler Van Scoy ("Van Scoy Depo."), May 25, 1994, and June 15, 1994, attached as Exh. A to Declaration of R. Christopher Locke ("Locke Decl."), at 153:9-154:19. The testimony of plaintiff's medical expert, Dr. Selina Bendix, Ph.D.,2 is similarly unhelpful to plaintiff's case. At her deposition, Dr. Bendix answered the following questions:

Q: Is it your opinion that Mr. Van Scoy is currently suffering from selenium poisoning?

A: So far as I understand, Mr. Van Scoy is not aware of any symptoms which can be attributed to selenium poisoning. He -- I have not had access to medical records. And there has not been a neurological examination. Therefore, I think it is possible that there are symptoms which Mr. Van Scoy is not aware of. This is not uncommon in cases of the initial stages of toxic effects of the nervous system.

And -- but, in view of the fact that I have no

evidence, all I can say is that I don't -- there's no obvious symptoms. There may be non-obvious symptoms, but there's no way of knowing with the available data.

Q: Okay. So, as you sit here today, you are not able to express the opinion that Mr. Van Scoy suffers from selenium poisoning to a degree of medical or toxicological probability?

A: That is correct.

Deposition of Selina Bendix, Ph.D. ("Bendix Depo."), April 25, 1995, attached as Exh. C to Locke Decl., at 11:3-21.3

In addition to having to current symptoms of selenium poisoning, plaintiff apparently has no evidence suggesting that he has an elevated level of selenium in his body. As far as the Court can discern, plaintiff has not had any medical tests in conjunction with this litigation except a blood test. In the December 1994 blood test, the level of selenium in plaintiff's blood was normal. Id. 12:12-13:9.

To explain the lack of any physical symptoms of selenium poisoning, plaintiff argues that the protein he has ingested along with the selenium has "masked" the selenium's effects. In support of this argument, plaintiff offers the following statement of Dr. Bendix during her deposition:

> I have a sense from the literature that there is a relationship between protein intake and the appearance of symptoms from high selenium intake. And I'm coming to think that the reason that Mr. van Scoy has not shown obvious symptoms of selenium poisoning full blown is because of his high protein intake. And it is not at this time clear to me whether the effect of protein is that the selenium in high-protein foods is less bioavailable, or whether the high protein level is protective.

Id. 14:12-20. Dr. Bendix's "sense", unsupported by any documentation or data whatsoever, is inadequate to establish "protein-masking" as a credible theory of injury. Moreover, plaintiff provides no evidence that any person has ever suffered physical injuries stemming from the ingestion of fish

contaminated with selenium.

In essence, plaintiff offers the Court nothing but his subjective belief that he has been poisoned by ingesting fish contaminated with selenium. No matter how firmly or sincerely held, this belief is insufficient as a matter of law to form the basis for a rational jury finding that plaintiff has been physically injured by eating contaminated sturgeon.

2. Economic Injury

Plaintiff's party-boat fishing business declined steadily between the 1988 oil spill and May 1994, when plaintiff sold his boat. Deposition of Philip A. Meyer ("Meyer's Depo."), Defendant's Exhibit 22, April 26, 1995, attached as Exh. B to Declaration of Charles G. Kinney. Plaintiff claims that defendant's selenium discharge is at least partly responsible for this decline.

In support of his economic injury claim, plaintiff relies primarily on his own deposition testimony. Plaintiff testified that existing and potential customers will not hire him for fishing trips, in part because they are concerned about selenium contamination of fish. Van Scoy Depo. 206:13-208:12.

Plaintiff also cites the deposition testimony of Philip A. Meyer ("Meyer"). Meyer testified that selenium may be implicated in the decline of plaintiff's business, but that other factors, unknown to Meyer, may also be at work. Meyer Depo. 26:6-30:3. Meyer further opined that the publicity given to issues surrounding selenium is such that people "who read newspapers and go to conferences in the Bay Area knew" that ... "there was a concern, rightly or wrongly, about selenium in the bay, ..." Id. 30:7-18.

Plaintiff's offerings are insufficient as a matter of law to create a genuine issue of material fact concerning whether defendant's selenium discharges have harmed plaintiff's party-boat fishing business. Plaintiff's testimony concerning the statements of third parties is inadmissible hearsay. Fed.R.Evid. 801 and 802. The Court therefore may not consider this evidence when ruling on defendant's motion for summary judgment. Fed.R.Civ.P. 56(e). Meyer's testimony suggest only that selenium could possibly have contributed to plaintiff's

economic losses;4 as such it is inadequate to establish a material factual dispute.

3. Emotional Injury

Plaintiff claims emotional distress damages stemming from his business losses and the ingestion of sturgeon contaminated with selenium. In California, compensable mental distress "may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Molien v. Kaiser Foundation Hospitals, 167 Cal.Rptr. 831, 837-38 (1980). The Court finds plaintiff's evidence insufficient as a matter of law to create a genuine issue of material fact concerning such serious emotional distress. Plaintiff cites not medical evidence or relevant expert testimony in support of this claim.5 Instead, plaintiff again relies on his own deposition testimony concerning his anger at defendant's discharge of toxins into the San Francisco Bay.

> I have definite anger about what Shell has done and is continuing to do as far as dumping the poison in the Bay, all the different toxics. Whatever all of them may be. Selenium happens to be the one that I'm most focused on.
>
> ...
>
> I'm angry about that. I get very upset with the thought that the same thing is happening to me with this selenium that happened with the oil spill.
>
> I get upset or used to before I sold the boat, get upset and angry when people called and asked about whether the fish were safe to eat. When they called and asked how the fishing was and I couldn't -- and I could not tell them the good news that I could before -- I am very upset about my son who really likes to fish, about what he's going to inherit as far as the Bay Waters.
>
> I'm particularly disturbed about the fact that Shell Oil Company was violating permits and dumping this garbage into the Bay at the same time this whole oil spill thing was going on.

Van Scoy Depo. 176:2-25.

Plaintiff's testimony is insufficient to support a finding of severe and extreme emotional distress. Particularly in the absence of any demonstrable physical or economic injury, defendant's selenium discharges are insufficient to cause a normally constituted person in plaintiff's position such serious mental discomfort.

B. The Lack of Demonstrable Injury is Fatal to Plaintiff's Claims

1. Negligence and Intentional Interference with Prospective Economic Advantage.

To recover under a theory of negligence or intentional interference with prospective economic advantage, a plaintiff must prove injury. See e.g. 6 Witkin, Summary of California Law, Tort sec. 1316 (9th ed. 1988) ("It is a fundamental principle that a negligent act does not give rise to liability without damage"); Morningstar, Inc. v. Superior Court, 29 Cal.Rptr.2d 547, 558 (1994) (the tort of intentional interference with prospective economic advantage requires a showing of "damages to the plaintiff proximately caused by the acts of the defendant"). Because the Court finds that plaintiff has not met his burden of demonstrating injury, defendant's motion for summary judgment with respect to these causes of action is granted.

2. Nuisance/Encroachment

To demonstrate a nuisance, plaintiff must show "a substantial and unreasonable invasion of one's interest in the free use and enjoyment of one's property." Lussier v. San Lorenzo Valley Water Dist., 253 Cal.Rptr. 470, 473 (1988). The selenium allegedly deposited on plaintiff's property cannot be seen or smelled, or perceived by the senses in any way. Moreover, as discussed above, plaintiff has not raised any triable issue of fact suggesting that he had been physically, emotionally, or economically injured by the selenium. The Court therefore holds that even if some selenium from defendant's refinery is present on plaintiff's property, as a matter of law plaintiff is unable to show a "substantial and

unreasonable invasion" of his "interest in the free use and enjoyment of" his property. Defendant's motion for summary judgment on this cause of action is granted.

3. Trespass

A plaintiff alleging trespass need not demonstrate actual damage. At common law the cause of action "was directed at the vindication of the legal right" to exclusive possession of property. W. Page Keeton et al., Prosser and Keeton on the Law of Torts sec. 13 at 75 (5th ed. 1984, supp. 1988). Because this right can be violated without resulting in any apparent injury, a successful plaintiff may be awarded nominal damages in a trespass action. Id.

In modern times, an exception to this common law rule has developed for overflight of aircraft. If the common law principle was strictly followed, any overflight at all, even one that caused no appreciable interference with the use or enjoyment of the land below, would be a trespass. To guard against this consequence, the Restatement of Torts has adopted the sensible position that only invasion or intrusion of air space within the immediate reaches of land is trespass, and then only if it causes substantial interference with the land. Restatement of the Law (Second) Torts sec. 159 (1965). California law is generally in accord with this rule. See Drennen v. County of Ventura, 112 Cal.Rptr. 907. 909-10 (1974).

The Court relied on the analogy to overflight by aircraft in ruling that plaintiff could maintain an action for trespass to the water beneath his harbor berth and the land beneath the water. Order Granting Defendant's Motion For Judgment On The Pleadings With Leave to Amend Within 20 Days Of This Order; Granting Defendant's Motion for Summary Judgment In Part; Denying Defendant's Motion For Summary Judgment In Part, October 12, 1994, at 21-22. Continuing with this analogy, the Court now holds that to prevail on his trespass cause of action, plaintiff must show substantial interference with the use and enjoyment of the water and subterranean land. This limitation on recovery is sensible because the right of exclusive possession associated with real property does not apply as

strongly to air overhead or water below.

As discussed above, plaintiff is unable to show injury of any sort. Accordingly, plaintiff is unable to satisfy one of the elements of the tort of trespass to water. Defendant's motion for summary judgment on this claim is therefore granted.

Conclusion

For the foregoing reasons, defendant's motion for summary judgment is **granted** in its entirety. The pretrial conference and trial date are vacated; the Clerk of the Court shall close the file.

SO ORDERED.

DATED: June 15, 1995

Signed by FERN M. SMITH, United States District Judge

1. Plaintiff's second amended complaint also includes a cause of action for "chemical battery." The Court dismissed this cause of action at the pretrial conference held June 6, 1996. Plaintiff had no objection.

2. Plaintiff offers no foundation for the admission of Dr. Bendix's testimony. From plaintiff's submissions, the Court is unable to ascertain even the field in which Dr. Bendix received her doctorate, much less whether she is qualified to opine on plaintiff's asserted selenium poisoning.

3. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1315 (9th Cir. 1995), the Ninth Circuit established a two part test for the admissibility of expert testimony. First, the trial court must determine whether the expert's proposed testimony reflects scientific knowledge derived by scientific method. Second, the court must verify that the testimony "logically advances a material aspect of the proposing party's case." Because Dr. Bendix is unable to state to a degree of medical or toxicological probability that plaintiff has been injured by

ingesting selenium, her testimony would not assist the trier of fact in reaching any conclusion. although the Court need not reach the question, her testimony would be inadmissible under Daubert.

4. For this reason, Meyer's testimony is inadmissible as unhelpful to the trier of fact. Daubert, 43 F.3d at 1315.

5. Plaintiff cites the deposition testimony of Dr. Bendix, in which she states: "so far as I understand, Mr. Van Scoy is not aware of any symptoms which can be attributed to selenium poisoning. He -- I have not had access to medical records. And there has not been a neurological examination. Therefore, I think it is possible that there are symptoms which Mr. Van Scoy is not aware of. This is not uncommon in cases of the initial stages of toxic effects of the nervous system." Bendix Depo., 11:3-12. The Court is unable to discern the relevance of this testimony to plaintiff's claim of emotional distress. If anything, Dr. Bendix's testimony undermines plaintiff's argument by suggesting that plaintiff has no noticeable physical symptoms which could be causing his alleged distress.

Endorsed file-stamped on June 19, 1995.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCHUYLER VAN SCOY, Plaintiff, vs. SHELL OIL COMPANY, a Delaware corporation, and DOES 1 through 40, inclusive, Defendant.	) No. C 93-4383-FMS))) ORDER GRANTING) (1) COSTS, (2)) ATTORNEYS' FEES,) AND (3) RELATED) NON-TAXABLE) EXPENSES)))

ISSUES

Defendant's motion for attorneys' fees and related non-taxable expenses, based on plaintiff's alleged violation of Federal Rule of Civil Procedure 11 and 28 U.S.C. sec. 1927, requires the Court to determine whether evidentiary support existed for plaintiff's claims, whether plaintiff's counsel put forth a frivolous argument for an extension of law, and whether plaintiff's counsel 1 unreasonably and vexatiously multiplied the proceedings in bad faith. The Court order sanctions to be imposed on counsel for pursuing claims lacking evidentiary support and for putting forth a frivolous argument for an extension of law.

Introduction

Defendant commenced this action of July 3, 1995, requesting costs, as prevailing party, and requesting attorneys' fees and non-taxable expenses from plaintiff's counsel, as a sanction under Rule 11 or, in the alternative, 28 U.S.C. sec. 1927. On August 9, 1995, this Court ordered that the "Bill of Costs" portion of the motion be referred to a Magistrate Judge.

On October 5, 1995, United States Magistrate Judge Wayne D. Brazil reported and recommended that the sum of $11,290.81 be awarded to defendant for taxable costs in this matter.2

The background of the case was fully set forth in this Court's June 19, 1995 Order granting defendant's summary judgment motion, and will not be repeated here.

Discussion

A. Rule 11 Sanctions

1. Applicability of Rule 11 as Amended December 1, 1993

Plaintiff first filed these claims in October 1993 before the December 1, 1993 amendments to Rule 11 were in effect. In its Order of April 22, 1993, the Supreme Court declared that the amendments to the Federal Rules of Civil Procedure "shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Because defendants request sanctions primarily for conduct after plaintiff's last expert was deposed on May 4, 1995, well after the amendment's effective date, the Court finds no reason why it is not "just and practicable" to apply the amended version of Rule 11 to its analysis.

2. Legal Standard for Rule 11

Rule 11, as amended, requires an attorney to "stop-and-think" about the legal and factual merit of any papers filed with the court. See Fed.R.Civ.P. 11 advisory committee's note, 1993 amendment. It also subjects "litigants to potential sanctions for insisting upon a position after it is no longer tenable ...." Id. By signing and filing the papers, the attorney certifies that (1) they are not being filed for an "improper purpose," such as delay or harassment, (2) that the claims, defenses and contentions are "warranted by existing law" or a "nonfrivolous argument" for the extension or change of existing law, and (3) that the filing has basis in fact. Fed.R.Civ.P. 11(b)(1)-(4). Filings that violate either of the last two representations are considered "frivolous," defined as "both baseless and made without reasonable and competent inquiry." Schwarzer, Tashima, Wagstaffe, Federal Civil Procedure Before

Trial, sec. 17:50 (1994), city Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990).

Rule 11 seeks to deter frivolous filings, which not only prejudice the opposing party but waste judicial resources. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986). Where an attorney is found to have violated Rule 11, the Court may impose appropriate sanctions. Fed.R.Civ.P. 11(c).

Courts use an objective standard to determine whether an attorney has violated Rule 11. An argument is legally unreasonable where it is "patently clear that the claim has absolutely no chance of success under the existing precedents, and ... no reasonable argument can be advanced" to change the law. Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2nd Cir. 1985). In other words, "if no plausible, good faith argument can be made by a competent attorney" in support of an argument, it is legally unreasonable. Zaldivar v. City of Los Angeles, 780 F.2d 823 831 (9th Cir. 1986). A finding of subject bad faith is not required, id.; "a pure heart, [but] empty head" is no defense to Rule 11. Fed.R.Civ.P. 11 advisory committee's notes, 1993 amendment.

B. Legal Standard for sec. 1927

Section 1927 provides that "[a]ny ... person admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct." 28 U.S.C. sec. 1927. In order to find that an attorney violated section 1927, a district court must find that the attorney acted recklessly or in bad faith. United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983). A district court should only utilize section 1927 "in instances evidencing a serious and standard disregard for the orderly process of justice." Dreiling v. Peugeot Motors of America Inc., 768 F.2d 1159 (10th Cir. 1985). Although the Court finds that counsel's continued pursuit of these claims was unreasonable and demonstrated a serious lack of

judgment, the Court declines to find that counsel acted in bath faith as defined by Ninth Circuit law. As such, the Court will analyze plaintiff's claims only under Rule 11 norms.

C. Analysis

In the Court's June 19, 1995 Order it cited plaintiff's failure to present any competent evidence of injury as the basis for granting defendant's motion for summary judgment. Rendering summary judgment against a party, however, does not necessarily mean that a party violated Rule 11. Rule 11 only requires that a party have "evidentiary support" for an allegation, not that the party prevail on its contentions.

A valid tension exists between the important goal of deterring baseless filings and the risk that aggressive applications of Rule 11 may discourage competent attorneys from representing individuals with valid, albeit novel, claims. With this balance as a standard, counsel's original filing of the case was not in violation of Rule 11 norms. But by the final deposition of plaintiff's experts, on May 5, 1995, when it became clear that plaintiff had no evidentiary support for his claimed injuries, counsel was in violation Rule 11's "duty of candor...[by] insisting upon a position after it [was] no longer tenable..." Fed. R.Civ.P. 11 advisory committee's note, 1993 amendment. Counsel was made aware of this potential in the June 6, 1995 Pretrial Conference:

> THE COURT: ... Mr. Kinney, I have to tell you, I've -- I haven't had time to study your pretrial statement in any depth, but it seems to me that you are raising issues that have little to do with the reality of this case. There's very little left, and some of the things you want to bring in as evidence are clearly either irrelevant, inadmissible for a variety of grounds, and to tell you -- I mean, to be honest, I can't believe you're serious about some of this. 4:23-25, 5:1-6.

In determining the extent to which plaintiff's counsel should be sanctioned for his conduct, an examination of the individual claims set forth by plaintiff is required to determine whether counsel's pursuit of specific claims lacked any evidentiary support and was therefore in violation of Rule 11

norms. The claims include: 1) nuisance; 2) trespass; 3) negligent interference with prospective economic advantage; 4) intentional interference with prospective economic advantage; and 5) chemical battery.

1. Nuisance and Trespass

Plaintiff had no evidentiary support for his injuries and counsel's pursuit of these baseless claims constitutes a violation of Rule 11 norms. As discussed in the Court's June 19, 1995 Order, plaintiff produced no competent evidence of physical, emotional, or economic injury. The inability to provide any evidence supporting injury provides a basis for determining that counsel should be sanctioned under Rule 11.

Plaintiff and his medical expert admitted that plaintiff had no symptoms of selenium poisoning. Plaintiff produced no evidence that he even had an elevated level of selenium in his body and was unable to produce <u>any</u> person who had suffered physical injuries stemming from the ingestion of fish contaminated with selenium. Further, plaintiff produced no medical or expert testimony that he has been emotionally injured because of the selenium dumping.

The only information plaintiff sets forth as evidentiary support of injuries is his subjective belief that he has been poisoned, his anger at defendant for the toxic dumping, and his subjective belief that selenium dumping caused his business to decline. Plaintiff was allowed a reasonable opportunity to investigate and discover evidentiary support for his claims; however, such evidentiary support was not obtained and counsel had a duty under Rule 11 not to persist with the claims.

2. Negligent and Intentional Interference with Prospective Economic Advantage

Although the June 19, 1995 Order states insufficient proof of economic injury as the basis for granting defendant's summary judgment motion on the "Interference with Economic Advantage" claims, plaintiff also failed to provide evidence of causation. Arguably, proof of this decline and eventual termination of plaintiff's business is evidence of injury; however, plaintiff set forth no timely evidence that the decline in business

was due to defendant's conduct.

Because of counsel's inexcusable neglect, what evidence may have been pertinent was not presented until plaintiff's motion for reconsideration of the summary judgment in favor of defendant. The Court denied the motion for reconsideration and did not entertain the declarations by two of plaintiff's customers (one of who was plaintiff's mother) stating that the reason they stopped calling plaintiff's business to set up fishing trips was fear of poisoning from selenium Shell was dumping in the bay. Counsel's dilatory work cost the Court and opposing party a lot of time, money, and frustration, but some evidentiary support (inadequate as it may have been to prevail on the issue) did exist for this claim; therefore, Rule 11 sanctions do not appear appropriate.

3. Chemical Battery

The Court found no support for plaintiff's chemical battery claim under California law and the claim was dismissed, without objection, during the June 6, 1995 Pretrial Conference. The claim was obviously not "warranted by existing law" and counsel's argument for a chemical battery claim, based on low grade poisoning that is objectively undetectable, was frivolous.

Plaintiff produced no admissible evidence or reasonable justifications for filing his chemical battery claim. Counsel proffered no support for this theory from minority opinions, law review articles, or consultation with other attorneys. Neither the alleged study made in China nor the expert witness, Dr. Bendix, who had a "sense" that protein masks the effects of selenium poisoning, were adequate to establish that protein masking of selenium poisoning may have occurred. Further, plaintiff provided no reasonable basis for extending intentional tort law to include this chemical battery claim. Although counsel was in violation of Rule 11 norms, the Court has taken into consideration the relatively early dismissal of this claim in determining an appropriate award for sanctions.

D. Defendant's Request

Defendant is requesting $97,506.99, representing $47,506.99 in related non-taxable costs and $50,000.00 in attorneys' fees. Defendant contends that the request for

attorneys' fees represents less than one-half of the total attorneys' fees incurred in defending the action and less than the fees incurred after the last of plaintiff's experts was deposed.

Conclusion

For the reasons discussed above, the Court orders:

1) plaintiff to pay defendant's taxable costs in the amount of $11,290.81, per Magistrate Judge Brazil's October 5, 1995, Report and Recommendation; and

2) plaintiff's counsel, Charles G. Kinney, to be sanctioned for pursuing untenable claims and to reimburse defendant in the amount of $20,000, representing $10,000 in non-taxable costs and $10,000 in attorneys' fees.

SO ORDERED.

DATED: November 30, 1995

Signed by FERN M. SMITH, United States District Judge

1. Plaintiff's counsel will herein be referred to as "counsel."

2. In response to Magistrate Judge Brazil's Report and Recommendation, plaintiff filed a "Suppiemental Opposition to Bill of Costs and Motion for Attorneys' Fees" on October 18, 1995, and an "Errata" to the supplemental opposition on October 19, 1995. Plaintiff argues that defendant should not recover any duplicating costs because defendant did not prove what percentage of its total duplicating cost was for "motions, pleadings, etc." for which Magistrate Judge Brazil found that half of defendant's duplicating costs was for "motions, pleadings, etc." and therefore limited recovery of duplicating costs to one half that requested, or $67.62. This appears to be an appropriate amount and the Court is not persuaded by plaintiff's argument.

Endorse file-stamped on Dec. 1, 1995.